Supreme Court, U.S.
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No. 97-642

In The

Supreme Court of the United States

October Term, 1997

DARRELL V. McGRAW, JR., Attorney General,
State of West Virginia,
Personally and in His Official Capacity,

Petitioner,

v.

BETTER GOVERNMENT BUREAU, INC.,
an Ohio Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROGER P. FUREY
THOMAS H. ODOM*
TERRI L. BOWMAN
ARTER & HADDEN
1801 K Street, N.W.
Suite 400K
Washington, D.C. 20006
(202) 775-7100

Attorneys for the Respondent

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

The United States Court of Appeals for the Fourth Circuit declined to rehear *en banc* its decision affirming the United States District Court for the District of West Virginia's determination that West Virginia Attorney General Darrell V. McGraw, Jr. ("McGraw") is not entitled to summary judgment that he has "qualified immunity" from suit in this matter. The district court found that McGraw's alleged actions were clearly outside the scope of his statutory authority. It also found that the rights he allegedly violated were clearly established at the time he acted, and that a reasonable official would have known as much.

The questions presented for review[1] are:

1. Whether Petitioner waived his challenges to the qualified immunity analysis employed by the Fourth Circuit by never before raising them and explicitly conceding that the Fourth Circuit's analysis was consistent with Supreme Court authority?

2. Whether a government official is entitled to qualified immunity as a matter of law when (a) he clearly acted outside the outer limits of his authority as specified by applicable state statutes and case law, and (b) the district court and court of appeals found that a reasonable official would have known, and the official himself knew, that his acts were *ultra vires*?

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[1] As a threshold matter, it is unclear whether this Court has jurisdiction to review these questions. *See infra* page 1.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner is Darrell V. McGraw, Jr.

Respondent Better Government Bureau, Inc., an Ohio Corporation, has no parent company or non-wholly owned subsidiaries.

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JURISDICTION

The opinion dissenting from the denial of the petition for rehearing *en banc* in this case raised the issue of whether this matter was properly subject to interlocutory appeal. Appendix to the Petition ("App.") 106. Judge Luttig observed that the panel did not provide

> even a note of explanation as to why it [did] not "simply follow the Supreme Court's mandate [that] when a district court denies summary judgment because of a purely factual question that decision is not immediately appealable."

Id. (citation omitted). Where the only matter determined by the district court was "whether the evidence could support a finding that particular conduct occurred," a district court's decision denying qualified immunity is not immediately appealable. *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 842 (1996). A district court's ruling is, however, immediately appealable to the extent that it "resolve[d] a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was 'clearly established.' " *Id.* (internal citations omitted); *see Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 2156-57 (1995).

A defect in the appellate jurisdiction of the court of appeals would eliminate the basis for this Court's jurisdiction under 28 U.S.C. § 1254. *See United States v. Nixon*, 418 U.S. 683, 691-92 & n.7 (1974). Consequently, the Court should not allocate its limited resources to this matter through a grant of certiorari without resolving that issue.

STATEMENT OF THE CASE

1. Introduction

a. Better Government Bureau, Inc.

Better Government Bureau, Inc. ("BGB") was incorporated as an association of private businesses and citizens under Ohio law on August 18, 1993, under the trade name and service mark "Better Government Bureau, Inc." BGB later incorporated a chapter in Washington, and was attempting to incorporate a chapter in West Virginia at the time the dispute that led to this litigation arose. On behalf of its members, BGB monitors government activities and actively publicizes in various media its views about government policies affecting business. BGB does not sell anything, but instead provides association services to its members. At the time of the summary judgment motions, BGB had a membership of 47 businesses and 304 individuals from various states. BGB actively used its trade name and service mark in commerce following its incorporation in 1993 and prior to its entry into West Virginia in 1994.

b. Incidents Leading to the Instant Dispute

A BGB member, Suarez Corporation Industries ("SCI"), complained to BGB about actions taken by West Virginia Attorney General Darrell V. McGraw, Jr. ("McGraw"), concerning SCI's advertising practices. Because McGraw's office refused to respond to BGB's inquiries and requests under West Virginia's Freedom of Information Act, BGB broadcast on three Charleston, West Virginia-area radio stations on September 8, 1994, an

announcement soliciting information from the public for its investigation of McGraw. Two weeks later, in an interview with the *Charleston Gazette*, BGB's president announced BGB's plan to open a Charleston office and form a West Virginia chapter. The newspaper article quoted the BGB president's criticism of McGraw.

To do business in West Virginia, BGB was required to either incorporate under West Virginia law, or obtain approval from the West Virginia Secretary of State before doing business in the state as a foreign corporation. During the first week of October, 1994, as a first step toward its intended incorporation of a West Virginia chapter, BGB's attorney filed an application for a certificate of authority to do business. That application was rejected, however, because unbeknownst to BGB, one week earlier McGraw had incorporated his own West Virginia corporation called the "Better Government Bureau, State of West Virginia, a government agency corporation" ("McGraw's corporation").[2] McGraw's incorporation precluded the Secretary of State from granting BGB's application under West Virginia law.

On October 12, 1994, BGB wrote separately to McGraw and Secretary of State Ken Hechler explaining that BGB was the first user of the trade name and service mark "Better Government Bureau" and requested them to take steps to allow BGB to register to do business in West

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[2] The Petitioner's and Fourth Circuit's statements (Pet. at 5 and App. 7, respectively) that BGB's application to do business as a foreign corporation in West Virginia came "[a]bout a month" after McGraw's incorporation are in error. *See* App. 59-60.

Virginia under its trade name and service mark. Hechler responded the following day, explaining that he would not comply with the request, and suggested BGB's actions in the absence of registration should prompt BGB to "consult with [its] attorney." McGraw did not respond to BGB's letter. BGB later learned the facts surrounding McGraw's decision to take BGB's name for his own "corporation."

c. McGraw Directed the Intentional "Stealing" of BGB's Name

On September 30, 1994, shortly following BGB's public criticism of McGraw and its announcement that it intended to open a chapter and engage in political activities in West Virginia, McGraw instructed one of his employees, Lila Hill, to reserve the name "Better Government Bureau" with the Secretary of State's Office. Ms. Hill complied with these instructions, incorporating McGraw's corporation on September 30, 1994.

The idea to reserve BGB's trade name and service mark with the Secretary of State came from the spouse of a staff attorney in McGraw's office who suggested that the Attorney General's Office "steal" the trade name and service mark, and form a West Virginia corporation under that name before BGB could do so.[3] McGraw encouraged the conduct, as he explained at deposition: "I was glad my people were being innovative and I was glad that

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[3] Ms. Hill's notes of the conversation state: "Steal name – form Better Government Bureau before they have a chance to do so." App. 60 n.3.

they were thinking good. And so I didn't discourage it, but I rather encouraged it."

Ms. Hill's initial attempt to "steal" BGB's name was unsuccessful. The Secretary of State's Office had placed an "administrative flag" on the words "Better Government Bureau," meaning that anyone who attempted to register the name was required to meet with Donald Wilkes, Director of the Secretary of State's Corporations Division. Consequently, the clerk would not accept Ms. Hill's application to reserve BGB's name.

Ms. Hill returned to McGraw, informed him of what had happened, and was instructed by McGraw to return to the Secretary of State's Office and to speak with Secretary of State Hechler directly. After she did so, the Secretary of State's Office allowed McGraw to reserve "Better Government Bureau." Later that day, after Ms. Hill and McGraw completed the incorporation forms, McGraw paid the incorporation fee himself, with a personal check.

McGraw has asserted that he innocently established his corporation in order to educate consumers, and that he happened to choose the name "Better Government Bureau" because he liked the "ring" of that name. The record is devoid of evidence, however, that McGraw's corporation has done anything since its incorporation on September 30, 1994, except to obtain a telephone listing. McGraw admits as much in his Petition. Pet. at 5. And, as explained below, McGraw's choice of a name that would have the effect of blocking BGB from incorporating under its own name was more than happenstance.

d. Significant Documents Were Not Disclosed

Two documents, which were not disclosed in discovery before the district court, further undermine McGraw's position that he acted innocently in creating his corporation.

The first document is a September 26, 1994, memorandum from Assistant Attorney General Daynus Jividen to Secretary of State Hechler pursuant to McGraw's personal direction. App. 83 (full text). The memorandum advised Hechler that BGB "will shortly seek registration" and asked Hechler "to resist and refuse such registration. . . . " *Id.* Jividen also requested that Hechler advise him when BGB attempted to register.

The second document is a September 27, 1994, memorandum from Hechler responding to Jividen's memorandum, following a "personal discussion with the Attorney General." App. 85 (full text). Hechler observed that he did "not recall any instance when any organization has been denied registration because of its political activity." *Id.* He also explained "that when an organization is in good standing in our neighboring state of Ohio, that makes it very difficult to deny registration in West Virginia." *Id.* He thus advised Jividen that the "issue of resisting and refusing such registration is more complicated [than] I at first imagined." *Id.*

Neither memorandum referred to any concern McGraw had with respect to the need for a corporation to promote consumer education. Despite their obvious relevance to the litigation, the documents were never

produced until a secretary turned the Jividen memorandum over to BGB long after discovery had closed, and while the matter was on appeal, after the secretary learned that the memorandum had not been turned over in discovery. In explaining the documents' nonproduction, McGraw claimed that the secretary had taken the only copy of the Jividen memorandum from the file, and that everyone had forgotten about it, notwithstanding the fact that it had been created only a few weeks before BGB filed its lawsuit. McGraw has never explained why he did not produce the Hechler response memorandum until after the secretary turned over the Jividen memorandum. McGraw subsequently fired the secretary.

e. McGraw Encouraged Other Attorneys General to Engage in Similar Conduct

On October 4, 1994, McGraw sent a letter to fifty-three attorneys general encouraging them to steal BGB's name in their jurisdictions. App. 61. The letter stated, in part: "To foreclose the possibility of such a corporation operating in your State, you may want to register the name of the Better Government Bureau as an agent for the Attorney General's office with the Secretary of State's Office or take other preventative measures." *Id.*

Two days later, McGraw sent a similar letter to the same recipients, adding the following:

> When you come up against these people [referring to BGB's member, SCI], you should know that there is a possibility that their *modus operandi* might include a proclivity to violence.

> Please recall my recent letter, in which I recommended that you protect the name Better Government Bureau in your State, otherwise when you act to protect your consumers you will be attacked by a Better Government Bureau for doing so.

Id. McGraw later conceded the attacks to which he referred were, at least in part, BGB's "negative" comments directed at him and his office through the media. *See* App. 86. He stated further that BGB's statements directed at him and members of his office constituted "obstruction of justice" merely because the statements were "intended to modify the behavior of public officials." *Id.*

f. McGraw Used Confusion About the Names to Harm BGB

McGraw used the similarity of the parties' marks to the detriment of BGB. The United States Postal Service delivered mail intended for BGB to McGraw's corporation. App. 62 n.5. Rather than forward the mail, an official in McGraw's office sent the mail to the Postal Service and suggested that the Postal Service assist McGraw's office in an investigation of BGB's use of the mails. *Id.*

Directory assistance operators have occasionally misdirected BGB's callers to the listing for McGraw's corporation. *Id.* An official in McGraw's office wrote to the telephone company and asked it to list BGB in a different fashion to reduce "the likelihood of confusion." *Id.*

2. The Proceedings Below

BGB filed this action on October 28, 1994, alleging that by forming a corporation using BGB's trade name and service mark, McGraw, acting in his personal and official capacities, violated BGB's rights under the constitutions of the United States and West Virginia, the Lanham Act, and common law protection for trade names and service marks. Following the completion of discovery, the parties cross-moved for summary judgment on all claims.

On October 16, 1995, the district court denied McGraw summary judgment on his qualified immunity defense with respect to the personal capacity claims.[4] App. 56, 57, 79. The district court held that BGB's allegations, and even some undisputed matters of record, supported a claim that "McGraw retaliated against BGB and attempted to thwart BGB's operational efforts so as to stem the latter's continued criticism of him." App. 73. The district court held that the law was clearly established at the time of McGraw's alleged actions "that a public official could not engage in retaliatory conduct designed to hamper or thwart a citizen's rights to free speech under the federal and state constitutions." *Id.* The

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[4] In addition, the district court affirmatively granted BGB summary judgment on the qualified immunity issue, App. 56, 57, 79, granting in part BGB's motion for summary judgment, which had thoroughly briefed the defense. McGraw acknowledged before the Fourth Circuit that the district court "grant[ed] summary judgment to [BGB], on the issue of qualified immunity." Brief of Appellant at 1-2. The Court should disregard the panel's cursory suggestion to the contrary, *see* App. 29 n.6, as plain error and *dicta*.

court noted that McGraw virtually conceded the point. App. 76. The district court concluded that a reasonable official in McGraw's position would have known that his conduct violated BGB's rights. App. 77-78. On this basis, the district court denied McGraw's claim of qualified immunity.

In a footnote, the district court stated "a second reason" why McGraw was not entitled to qualified immunity: "His actions were beyond the permissible realm of his discretionary duties and thus outside his scope of authority." App. 78. McGraw appealed the ruling that he was not entitled to qualified immunity.

While the appeal was pending before the Fourth Circuit, BGB learned of the existence of the two highly relevant documents that were neither identified nor produced in discovery. The Fourth Circuit remanded the matter for purposes of supplemental discovery and briefing on the qualified immunity issue.

On April 25, 1996, the district court issued a supplemental opinion, noting that the new evidence "provide[d] strong additional support for the Court's qualified immunity analysis." App. 82. For example, the court found that the two newly disclosed documents "give rise to a strong inference that . . . McGraw's actions were aimed at burdening the political speech BGB aimed at McGraw and his staff." App. 88. Moreover, the court found that "the alleged innocent non-production . . . is very difficult for the Court to credit" and it undermined McGraw's assertion that he had an innocent motive in establishing his

corporation. App. 88-89. Consequently, the court reinstated its prior holding that "McGraw is not entitled to qualified immunity." App. 89. McGraw again appealed.

A panel of the Fourth Circuit unanimously affirmed the district court's denial of summary judgment to McGraw on the basis that he "engaged in activity a reasonable official in his position would have known was clearly established to be beyond the scope of his authority." App. 4. The panel held that "an official should only be held to be acting beyond the limits of his authority when he commits acts 'clearly established' to be beyond the scope of that authority." App. 17.

The panel explained that "[t]his test is objective, and examines what a reasonable official in the defendant's position would have understood the limits of his statutory authority to be." App. 18; *see* App. 21.[5] The panel also emphasized that this test would apply only in a very small class of cases "because most § 1983 claims involve conduct that relates to, or flows from, conduct that the official is indeed authorized to commit." App. 20.

Applying that test, the panel explained:

> [T]he proper inquiry in the instant case is whether McGraw's action – forming his own "government agency" corporation under the auspices of the Attorney General's Office – was clearly established to be beyond the scope of his

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[5] Thus, contrary to Petitioner's assertion, this case does *not* present the prospect of a loss of qualified immunity when an official's "misapprehension or misjudgment as to the scope of his or her authority is *negligently* or innocently done." Pet. at i (emphasis added).

> authority. The issue is *not* whether McGraw exceeded the scope of his authority by forming this corporation in retaliation for speech critical of him.

App. 22-23. The panel turned to state law to answer the inquiry:

> West Virginia law narrowly circumscribes the powers of the Attorney General. Indeed, McGraw himself so held in an opinion he authored as a justice of the Supreme Court of Appeals of West Virginia. *See Manchin v. Browning*, 296 S.E.2d 909, 914-17 (W. Va. 1982). *Manchin* held that under West Virginia law "the powers and duties of the Attorney General" are limited to those "specified by the constitution and by rules of law prescribed pursuant thereto." . . .
>
> . . . No West Virginia law expressly grants the Attorney General the right to establish a corporation, let alone a "government agency" corporation under the auspices of the Attorney General's office, and no West Virginia Attorney General has ever done so. McGraw concedes this.

App. 24.[6] The panel rejected McGraw's arguments that his oath of office and his statutory authorization to "[r]eceive and act on complaints . . . [and] [e]stablish programs for the education of consumers" empowered him to create his own "government agency" corporation. App. 25, 26-27. The panel pointed out that West Virginia's highest court in *State ex rel. Fahlgren Martin, Inc. v.*

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[6] McGraw raised no argument on rehearing or before this Court that the panel misinterpreted West Virginia law.

McGraw, 438 S.E.2d 338 (W. Va. 1993), has emphasized that " 'the powers of the Attorney General [in West Virginia] are strictly defined by Constitution and statute.' " App. 27. The panel further stated that West Virginia law clearly established that "the West Virginia legislature, rather than its executive branch (or any member of that branch), is the body vested with the power to create government corporations." App. 28. The panel thus concluded that "McGraw performed an act a reasonable official in his position would have known was clearly established to be beyond the scope of his official duties." App. 29. The panel expressly did *not* address the district court's finding that "BGB alleged a violation of clearly established First Amendment rights, and that a reasonable person in McGraw's position would have known that his alleged conduct violated these rights." App. 13 n.2.

McGraw petitioned for rehearing and suggested rehearing *en banc*. McGraw's only argument for rehearing was that the panel did not address expressly the vitality of the Fourth Circuit's decision in *McElveen v. County of Prince William*, 725 F.2d 954 (4th Cir.), *cert. denied*, 469 U.S. 819 (1984).

On July 17, 1997, the Fourth Circuit denied rehearing. App. 91, 94. The judges concurring in the denial of rehearing *en banc* observed that McGraw "expressly conceded" that the qualified immunity test applied by the panel is consistent with Supreme Court authority. App. 94-95. They also noted that the judges dissenting from rehearing addressed "a basis never suggested by McGraw." App. 95.

On September 9, 1997, the district court stayed further proceedings. McGraw's petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

Realizing that he had no recourse under the consumer protection statutes of West Virginia to prevent BGB's critical speech, McGraw decided to take matters into his own hands by colluding with the Secretary of State to create a sham "corporation" for the purpose of blocking BGB from legally forming a chapter in West Virginia under its own name. McGraw's claim that he is entitled to qualified immunity for this flagrant abuse of power is not a matter worthy of this Court's review.

1. Petitioner Waived The Arguments Now Presented To This Court

McGraw has not previously advanced, in either the district court or the court of appeals (on the merits or on rehearing), his arguments based on an unprecedented interpretation of *Davis v. Scherer*, 468 U.S. 183 (1984). Rather, his Petition adopts, and in fact quotes at length from, the opinion dissenting from the denial of rehearing *en banc*. *See* Pet. 11-12, 15, 18. As Judge Diana Gribbon Motz, the author of the Fourth Circuit's decision on the merits, pointed out, the dissenting judges argued for rehearing "on a basis never suggested by McGraw or adopted by *any* court." App. 95. Thus, BGB has never had an opportunity to address the issues Petitioner raises for the first time here. Nor did any court below decide the

issue Petitioner raises here, *see United States v. Williams*, 504 U.S. 36, 39 (1992), as the arguments were first raised *sua sponte* by the judges dissenting from the denial of rehearing. *Cf. Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (Court is precluded from considering argument raised for first time on rehearing). Petitioner's failure to raise his arguments in a timely manner precludes this Court's consideration of them. *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957); *EEOC v. FLRA*, 476 U.S. 19, 24 (1986).

2. Petitioner Limits His Challenge To Only One Of The Alternative Bases That Support The Denial Of Summary Judgment On McGraw's Qualified Immunity Defense

The district court relied on two alternative bases to find that McGraw was not entitled to summary judgment on his claim of qualified immunity. McGraw's petition to this Court addresses only one of those bases. Consequently, even if the Court issued the writ and answered Petitioner's questions in the affirmative, those answers would not dictate a different result below. *Whitley v. Albers*, 475 U.S. 312, 326 (1986) ("any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision") (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977)). Because McGraw presents no challenge to the district court's alternative ruling, *i.e.*, that McGraw violated clearly established rights of which a reasonable official would have known, the Court should decline to issue the writ directed only to the ruling regarding the scope of McGraw's authority.

3. Petitioner Identifies No Conflict Or Confusion Among The Circuits

Petitioner does not assert that there is a division among the circuits. At most, he argues that some circuit court precedents are not being consistently followed within those circuits. Pet. at 23-26. That is not a matter that requires this Court's involvement. Moreover, the cases Petitioner identifies are consistent with and supportive of the panel's decision in this case.

The cases Petitioner cites uniformly recognize that officials are not entitled to qualified immunity for actions taken outside the scope of their authority, and that the determination of the proper scope of authority is independent from a determination of whether the official violated clearly established rights. *See Shechter v. Comptroller of New York*, 79 F.3d 265, 268-69 (2d Cir. 1996) (no qualified immunity unless "the conduct of which the plaintiff complains falls within the scope of the defendant's official duties," *and* official "did not violate . . . clearly established statutory or constitutional rights"); *Merritt v. Mackey*, 827 F.2d 1368, 1373 (9th Cir. 1987) (no qualified immunity when officials *either* "knowingly acted outside the scope of their authority," *or* "violated [plaintiff's] clearly established constitutional rights"); *Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995) (official must "act[] within the scope of her discretionary authority,"[7] and *even if* within scope, will not be entitled to qualified immunity if she "violated . . . clearly

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[7] "A governmental official acts within her discretionary authority if the actions were (1) 'undertaken pursuant to the performance of [her] duties' and (2) 'within the scope of [her] authority.' " *Lenz*, 51 F.3d at 1545 (internal citations omitted).

established statutory or constitutional rights"); *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (same two-part test); *A.M. v. Grant*, 889 F. Supp. 1495, 1506-08 (M.D. Ala. 1995) (same), *aff'd*, 68 F.3d 486 (11th Cir. 1995) (unpublished table decision). None of the other cases cited by Petitioner address a situation where there was any allegation that the official acted outside the bounds of his discretion.

Moreover, none of the cases Petitioner cites hold that case law is the only means to make a right clearly established. The Ninth Circuit looked to formal personnel policies as well as decisional law in making its determination in *Merritt*, 827 F.2d at 1373. The Eleventh Circuit, under the first prong of its analysis, looked to state statutes, administrative regulations, and the applicable training manual in *Lenz*, 51 F.3d at 1546-47 & n.4, 1551 & n.12. These courts never suggested that case law was the only acceptable means to define the scope of officials' authority. Nor did they indicate that in the absence of case authority, the officials were unfettered. *See also Lassiter*, 28 F.3d at 1150 n.4 (acknowledging that a statute or even a constitutional provision could "be specific enough to establish the law . . . to overcome qualified immunity even in the absence of case law."); *A.M.*, 889 F. Supp. at 1506-08 (looking exclusively to state statutes to decide whether official's conduct was authorized). The only language in Petitioner's cases suggesting otherwise was in situations where no statute or regulation was at issue before the courts, and thus those cases are easily distinguishable.

In *Francis v. Coughlin*, 891 F.2d 43 (2d Cir. 1989), although the court stated that one of its inquiries was to

look to decisional law for a clearly established right, on each of the issues presented there, the court's own case law definitively answered the question. There was no need to look to other sources of law. *See id.* at 46, 47, 48; *see also Pisello v. Town of Brookhaven*, 933 F. Supp. 202, 218-19 (E.D.N.Y. 1996) (stating that action at issue need *not* have been previously held unlawful, but rather "the unlawfulness must be apparent in light of preexisting law"); *Wise v. New York City Police Dep't*, 928 F. Supp. 355, 370, 373 (S.D.N.Y. 1996) (undisputed that case law resolved the issue). In *Zappala v. Albicelli*, 954 F. Supp. 538 (N.D.N.Y. 1997), the court found no clearly established right, without addressing whether some non-decisional law would be adequate to establish the right. *Id.* at 544-45.

Moreover, the alleged violations at issue in *Francis*, as in *Shechter*, 79 F.3d at 271, rested on the due process clause alone, unlike the present situation. Even if rights under constitutional due process may require case law to be "clearly established," it does not follow that any case law is required here.

The absence of any division of authorities on the precise questions presented suggests that this matter does not warrant this Court's attention.[8]

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[8] Petitioner cites *Horta v. Sullivan*, 4 F.3d 2 (1st Cir. 1993), but does not identify any inter- or intra-circuit division with that authority.

4. This Case Arises On Unique Facts And Raises No Issue Of National Significance

This case does not present a situation where it is alleged that a government official violated the plaintiff's rights in the manner in which he exercised his discretion, but rather the rare situation that the official was acting clearly outside the outer limits of his discretionary authority. Moreover, contrary to Petitioner's suggestion, this case does not present a situation where McGraw failed to establish his entitlement to qualified immunity because his "misapprehension or misjudgment as to the scope of his . . . authority [was] negligently or innocently done." Pet. at i. Rather, both the district court and the panel determined that a reasonable official in McGraw's position would have known he was clearly beyond the outer scope of his authority. Thus, because of the unique and unprecedented factual circumstances of this case, it is not "an important question of federal law" that warrants the Court's attention. Sup. Ct. R. 10(c).

5. This Case Does Not Depart From This Court's Precedents

McGraw's argument that the panel's decision departs from *Davis v. Scherer*, 468 U.S. 183 (1984), disregards the different factual situation of this case from that presented in *Davis*. While McGraw unreasonably extends the Court's holding in *Davis*, the instant case is similar to and consistent with *Butz v. Economou*, 438 U.S. 478 (1978).

In *Davis*, the plaintiff brought suit alleging that the defendants "had violated the Due Process Clause of the

Fourteenth Amendment by discharging appellee from his job without a formal pretermination or a prompt post-termination hearing." *Davis*, 468 U.S. at 187. There was no allegation that the defendants lacked authority to dismiss Scherer, only that they did so in a manner that violated due process. The Court held that the authority exercised in *Davis* "remain[ed] discretionary however egregiously it [was] abused." *Id.* at 196 n.14.

In the present case, the panel's reasoning was not that McGraw is liable because in the course of his duties he exercised his discretion in a manner that violated state law. Rather, the panel addressed the situation where state law did not provide McGraw with any discretion whatsoever because his duties did not extend to the matter in question.

This Court recognizes the importance of the type of distinction between this case and that in *Davis*, and has concluded that "it is not unfair to hold liable the official who knows or should know he is acting outside the law." *Butz*, 438 U.S. at 506; *see also id.* at 493 n.18 ("an executive officer would be vulnerable if he took action 'manifestly or palpably' beyond his authority or ignored a clear limitation on his enforcement powers").

Moreover, the panel's decision in this case is supported by the common law. The Court has previously explained the importance of common law in an immunity analysis:

> Our initial inquiry [regarding immunity under 42 U.S.C. § 1983] is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. If an official

> was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.

Malley v. Briggs, 475 U.S. 335, 339-40 (1986) (internal citations and quotation omitted); *see Wyatt v. Cole*, 504 U.S. 158, 163-64 (1992). In 1871, when Congress enacted section 1983, government officials had no immunity for acts that were outside the scope of their authority. *See Butz*, 438 U.S. at 489-90; *Bates v. Clark*, 95 U.S. 204, 209 (1877) (rejecting official's argument of no liability where they "were utterly without any authority in the premises").

As *Butz* makes plain, the panel's decision does not conflict with this Court's precedents, it follows them.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROGER P. FUREY
THOMAS H. ODOM*
TERRI L. BOWMAN
ARTER & HADDEN
1801 K Street, N.W.
Suite 400K
Washington, D.C. 20006
(202) 775-7100

Attorneys for the Respondent

November 25, 1997 **Counsel of Record*